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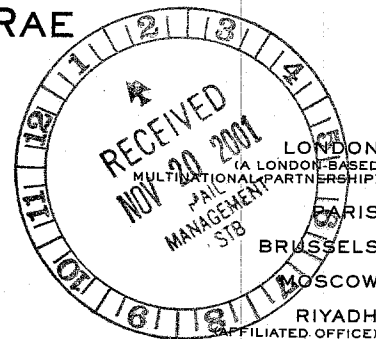
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November 20, 2001

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VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, D.C. 20423

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Office of the Secretary

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Re: Ex Parte No. 586, Arbitration -- Various Matters Relating To
Its Use As An Effective Means of Resolving Disputes That
Are Subject To The Board's Jurisdiction

Dear Secretary Williams:

Enclosed are the original and 10 copies of the "Comments of Edison Electric Institute" for filing in the above-referenced proceeding, and a diskette containing the Comments in WordPerfect format.

Also enclosed are three additional copies for date stamping and return via our messenger.

Very truly yours,

Michael F. McBride

Michael F. McBride

Attorney for Edison Electric Institute

Enclosures

20394

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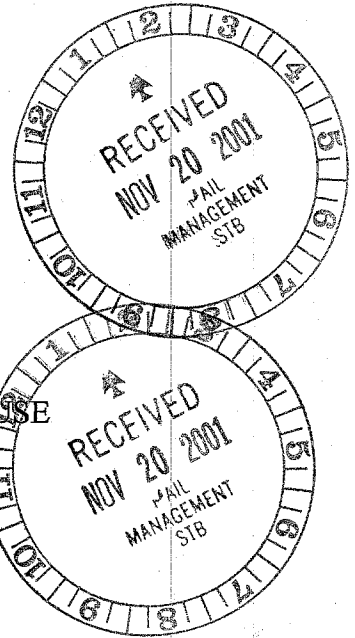
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UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 586

ARBITRATION -- VARIOUS MATTERS RELATING TO ITS USE
AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES
THAT ARE SUBJECT TO THE BOARD'S JURISDICTION



OPENING COMMENTS OF EDISON ELECTRIC INSTITUTE

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Attorney for Edison Electric Institute

Due Date: November 23, 2001
Dated: November 20, 2001

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 586

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OPENING COMMENTS OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI"), the association of investor-owned electric utilities, hereby submits its Opening Comments in this proceeding.

EEI appreciates the Board's willingness, as expressed in its decision served October 26, 2001, to entertain comments on disputes other than those involving small rate disputes. As the Board is well-aware, EEI's interests generally concern disputes other than those involving small rate disputes. Many of EEI's members ship large volumes of coal or other commodities, and they are often captive to a single railroad at destination or origin or both for deliveries of coal and other commodities. As such, EEI and its members depend on the Board for regulatory relief where competition is not available to them. The Board has considered many cases involving such claims, and, therefore, it is well aware of EEI's interests in them.

In general, EEI supports the availability of arbitration or other ADR procedures where (1) either both parties agree, or (2) if a shipper chooses to invoke ADR procedures as a substitute for regulatory procedures in a proceeding in which the Board otherwise has jurisdiction, as S. 1103 contemplates.

However, EEI would oppose the adoption of ADR procedures if those procedures were required of shippers as a substitute for regulation of railroads that is (or would otherwise be) available under law. EEI is firmly of the view that the existing rights of a shipper to invoke the Board's jurisdiction over railroads are necessary to protect EEI's members from potential monopoly abuse.¹ Arbitration and other ADR procedures are not panaceas, and they are ill-suited to some disputes, given particular facts with respect to the nature of the parties involved or the relative experience of the two parties in such proceedings, among other factors.² Moreover, although some entities, including shippers, firmly believe that ADR is superior to regulation, others disagree, especially if the "ground rules" are such as to favor one side.

EEI believes that, although some matters may be well-suited for ADR, such as small rate disputes, loss and damage claims, disputes involving operational details, and the like, other matters are not necessarily well-suited to resolution by use of ADR procedures. Those types of disputes that are not necessarily well-suited to ADR procedures include merger proceedings (and

¹ Without the Board in a position to exercise its statutory authority, the railroads' market power often would leave EEI's members powerless to protect their interests in the marketplace. Moreover, the Board has demonstrated its continued importance to protection of the public interest in a variety of its actions, such as its determinations that certain rail rates exceed a reasonable maximum, that certain shippers are entitled to remedies in control proceedings, that railroads must carry spent nuclear fuel and radioactive waste, and that shippers are entitled to "build out" to reach a competing railroad. For those reasons, EEI in 1979-80 supported the continued authority of the ICC in the Staggers Rail Act, the retention in 1995 of much of that authority for the STB in the ICCTA, and the continued appropriation of funds in several annual appropriation bills.

² Railroads, of course, have more experience with arbitration proceedings involving them than do most individual shippers. Given that the results of such arbitration proceedings are almost always confidential, the railroads have a natural advantage in litigating an arbitration proceeding, whereas the fact that the Board's decisions are public may ensure a more "level playing field" in disputes adjudicated by the Board.

remedies for shippers adversely affected), large rail rate disputes (unless the parties have agreed, or can agree, on procedures suited to the particular dispute), abandonments, "build-outs," disputes involving the duty of railroads to carry commodities and the conditions associated therewith³, car supply orders, and the like.

Moreover, EEI opposes ADR for matters in which the "public interest" is a relevant or necessary factor, as is the case with at least some of the matters set forth above. The reason is that, in a private, two-party arbitration, no party would speak for the public interest, and the public would not be on notice of the proceeding (they are generally confidential) or, certainly, allowed to participate. Moreover, an arbitrator or panel of arbitrators cannot be expected to assume the role of protector of the public interest, and in EEI's experience they would not assume that role. Arbitration, in short, may be appropriate for private disputes, but not for matters in which the public has an interest.

Ultimately, the proper approach for Congress to take, and thus for the Board to recommend, is that the Board should be retained with all of its existing authority, whatever ADR procedures the Congress may adopt. Any ADR procedures should apply only where (1) the parties agree to be bound by them or (2) a party chooses to invoke ADR instead of the regulatory rights to which the party is entitled.

³ The Board or its predecessor the ICC have had to resolve such disputes in the past, including whether railroads may refuse to carry radioactive materials, whether they could compel wasteful practices associated with the carriage of radioactive materials, and whether a railroad could shift to shippers its liability for failure to supply clean railcars to them. Where railroads assert the right to take such positions, it is highly unlikely that arbitration or other ADR procedures will resolve the matter. Simply put, the Board's "big stick" is sometimes necessary to assure shippers the transportation to which they are entitled from railroad common carriers.

Often, in proceedings involving railroads, the outcome of the proceeding may have an impact on other parties, such as a decision with respect to an abandonment, a car-supply order, a condition to a merger or acquisition, or even a "build out" if other shippers might have access to it. In such circumstances, it is obvious that there must be meaningful Board or judicial review (or both) so that the public interest is protected. In any event, Congress may be wise to provide for meaningful review of all arbitration awards, to ensure uniformity and fairness to all concerned.

Conclusion

EEI applauds the Board for convening this proceeding, and for conducting a legislative-type proceeding for Congress during the current circumstances in which Congress is otherwise engaged. Moreover, the Board is able to give all interested parties an opportunity to be heard, which Congress generally does not have the time or the procedures in place to accomplish readily. For those reasons, the Board should continue to conduct proceedings such as this on any matter which is the subject of substantial concern by shippers and which Congress has expressed a desire to have the Board consider in the first instance.

On the merits, EEI supports ADR procedures where the parties to the dispute agree to submit the dispute to resolution in that manner, or where a party chooses to invoke ADR procedures to resolve a matter within the Board's statutory jurisdiction. EEI would oppose any suggestion that ADR procedures might be an adequate substitute for the Board. EEI urges the

Board to consider the proposals EEI made herein to use ADR processes where it is appropriate to do so.

Respectfully submitted,

Michael F. McBride

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CERTIFICATE OF SERVICE

I hereby certify that I have served, this 20th day of November, 2001, a copy of the
foregoing "Comments of Edison Electric Institute" upon the following:

Nicholas J. DiMichael, Esq.
Thompson Hine LLP
1920 N Street, N.W.
Washington, DC 20036


Michael F. McBride